Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of the Verizon Telephone Companies	)	
for Forbearance under 47 U.S.C. § 160(c)	)	WC Docket No. 04-440
From Title II and *Computer Inquiry* Rules with	)	
Respect to Their Broadband Services	)	

COMMENTS OF VONAGE HOLDINGS CORP.

Verizon's petition to exempt its broadband services from all Title II and *Computer Inquiry* requirements is very similar to BellSouth's forbearance petition in Docket 04-405, on which Vonage has recently commented. Those comments demonstrated that BellSouth's vastly overbroad request for a license to discriminate against independent providers of VoIP and other IP-enabled services (through elimination of its nondiscrimination obligations) would jeopardize competition and consumer choice. Rather than repeat these comments here, Vonage has attached its prior comments to be incorporated into the record of this proceeding to demonstrate that Verizon's requested relief is contrary to the public interest and fails to meet the statutory standards for forbearance. Vonage's attached comments from the BellSouth proceeding should be read first, and the following supplemental comments are provided to address additional failings of the Verizon Petition.

I. CONSIDERATION OF THE SWEEPING RELIEF REQUESTED CAN WAIT FOR RESOLUTION OF THE COMMISSION'S BROADBAND RULEMAKING PROCEEDINGS.

Vonage does not disagree with the ILECs that federal telecommunications regulation should be retuned for the twenty-first century, with an eye toward reducing regulation and

assuring a level playing field in the broadband market. But federal broadband policy should be developed according to a holistic plan, and – absent exigent circumstances – not from a haphazard series of waivers and *ad hoc* exemptions from existing rules. The Commission has already charted this course to update its regulatory framework for broadband information services in its *IP-Enabled Services* proceeding.[1] The public interest similarly demands a comprehensive, consolidated rulemaking proceeding to establish an appropriate regulatory scheme for all underlying broadband transmission providers, in particular for LECs and cable companies. For example, Chairman Powell and many others have recognized the need to assure that these transmission providers employ "network neutrality" so that consumers will be able to use their broadband connections to access the content, applications and services of their choice.[2] Until the Commission has fully considered what new regulations such as network neutrality requirements may be needed to protect consumers in this evolved market, and then determined the statutory basis on which to base such new rules,[3] it must necessarily exercise restraint in considering requests such as Verizon's and BellSouth's for piece-part eliminations of the existing foundation on which the current market is rooted.

Vonage appreciates that in certain circumstances a regulation may be so obviously unnecessary, or the harms of a particular regulation so severe, that immediate *ad hoc* relief may be warranted prior to the completion of a comprehensive rulemaking proceeding. But such a case clearly cannot be made here for all of Verizon's requested relief, especially for the

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[1] *IP-Enabled Services, WC Docket 04-36, Notice of Proposed Rulemaking,* (rel. Mar. 10, 2004).

[2] Remarks of Chairman Michael K. Powell at the Silicon Flatirons Symposium, "Preserving Internet Freedom: Guiding Principles for the Industry" (Feb. 8, 2004), see http://www.fcc.gov/commissioners/powell/mkp_speeches_2004.html.

[3] For the Commission to have authority under Title I, there must be some nexus to another title of the Act. *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). The Commission should therefore be especially cautious not to completely sever its jurisdiction over the underlying broadband transmission services that it now possesses under Title II.

elimination of its basic nondiscrimination and reasonableness obligations under sections 201/202 and the *Computer Inquiry* rules. Indeed, Verizon and BellSouth have through their own statements made clear that there is no compelling need to rush consideration of forbearance from their section 201 and 202 obligations prior to the completion of the broadband rulemaking proceedings.

First, there is no apparent need for immediate relief from these core obligations because Verizon has stated that it does not intend to discriminate or act unreasonably anyway. Verizon, like BellSouth, claims that while it is asking for a license to discriminate, it has disavowed any intent to actually use it.[4] While this assertion should arouse skepticism,[5] if Verizon is in fact committed not to discriminate against or impose unreasonable conditions on VoIP and information services providers, then there is no need for the Commission to rush to consider Verizon's request to eliminate its obligations under sections 201 and 202. Therefore, even if the Commission is not persuaded to reject Verizon's petition immediately as failing to meet the standards for forbearance (as demonstrated in Vonage's attached comments from Docket 04-405), Verizon's request can instead readily be deferred to the Commission's broadband rulemaking proceedings (at which time it should be rejected).[6]

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[4] *See* Verizon Reply Comments, Docket 04-405, at 20-21.

[5] Contrary to Verizon's contentions, broadband providers have the incentive and the ability to discriminate, and the Commission should assume at a matter of prudence that if broadband providers were permitted to discriminate that some would do so. *See* Section II below; *see also* Vonage Comments, Docket 04-405, at 6-9 (describing the LECs' incentives to discriminate against VoIP, and their ability to frustrate the ability of independent VoIP providers to establish optimal 911 solutions that are desired by customers).

[6] As noted in Section II below, preservation of at least some existing Title II and *Computer Inquiry* obligations will remain necessary even after network neutrality rules are established. For example, LECs should remain required to offer VoIP providers with nondiscriminatory access to 911 systems. In addition, all vertically-integrated broadband transport providers (including all LECs and cable broadband providers) should remain prohibited from discriminating against independent providers of information applications and services.

Second, BellSouth recently re-stated that it supports a two-year transition from its *Computer Inquiry* obligations.[7] If even the ILECs are content to wait two years for the complete elimination of these obligations, it cannot be considered unreasonable to wait long enough for the Commission to have a reasonable opportunity to conduct a proper review of its broadband policies after the *Brand X* litigation is completed.

Verizon may understandably protest that it has already waited for more than two years. But that cannot justify a premature Commission decision. Even Verizon's Petition recognizes that the Commission may determine that some regulation of LEC and cable broadband transmission services remains necessary.[8] Foremost among the new regulations to be considered are network neutrality requirements, which are needed to protect consumers and promote competition, innovation and openness in the IP-enabled services market. Since network neutrality is fundamentally a principle of nondiscrimination, it would be imprudent for the Commission to needlessly pull the carpet out from under its own feet by abandoning its Title II authority in the broadband market just as it begins to consider the need for new rules that might best be rooted in that authority. Therefore, the Commission should defer consideration of Verizon's unnecessary request for forbearance of sections 201-202 and the open access requirements of the *Computer Inquiry* rules until it is prepared to address broadband regulation and network neutrality on a comprehensive basis.

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[7] BellSouth Reply Comments, Docket 04-405, at 34-35.

[8] Verizon has stated that if the Commission determines that particular regulations are warranted, "implementing such provisions under Title I for all broadband platforms clearly would do more to advance those goals than would imposing them through Title II regulation only on the local telephone companies who are minority players in the broadband market." Verizon Reply Comments, Docket 04-405, at 26. Vonage agrees, for example, that new network neutrality requirements should apply equally to LECs and cable companies, but notes that notwithstanding the *Cable Modem Order*, the Commission retains authority to subject cable broadband services to Title II regulations.

II. THE PUBLIC INTEREST STILL DEMANDS AN "INSURANCE POLICY"AGAINST DISCRIMINATION EVEN IN COMPETITIVE MARKETS.

Though acknowledging the prospect of a new regulatory scheme for broadband transmission providers, Verizon suggests that a temporary period of complete non-regulation in between the old rules and new ones would be harmless because it has no plans or even any ability to discriminate against VoIP.[9] Realistically, however, the Commission should assume at least out of prudence that if vertically-integrated broadband providers such as Verizon and BellSouth were permitted to discriminate, some would do so. As Vonage has previously explained, even if ILECs do plan to provide unfettered access to most information services in order to provide more value to their customers, that incentive may be outweighed by an even more powerful incentive to discriminate against independent applications providers that compete with an incumbent's core telephone services.

Recognizing the appearance of these incentives, Verizon's Petition offers the back-up argument that any attempt to discriminate against a non-affiliated VoIP provider would be "fruitless" because such a policy would "drive customers desiring such services to competing cable modem providers or other broadband alternatives." Verizon misses the point. In fact, the relief requested by Verizon may permit it or other LECs to discriminate in favor of their affiliated VoIP offerings through preferential treatment of access to 911 or other critical telecommunications infrastructure. As explained in Vonage's attached comments opposing BellSouth's petition, Vonage and other VoIP providers need the cooperation of the LECs to provide optimal 911 service to any customer, *even those that access VoIP over cable facilities.*[10] As consumers increasingly look to VoIP to replace their circuit-switched phone service,

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[9] *See* Section I, *supra.*

[10] *See* Vonage Comments, Docket 04-405, at 7-9.

Vonage's ability to offer effective 911 service is critical for its competitive viability. Thus, freed of nondiscrimination obligations, the LECs could further impede Vonage's ability to deploy services essential to the public interest. For this and other reasons, the public interest demands that LECs remain subject to certain Title II and *Computer Inquiry* obligations even after the Commission establishes network neutrality rules.

Second, in a completely deregulated market, there is no guarantee that broadband customers disgruntled by a carrier's practice of blocking VoIP would have better alternatives. Even for those consumers who have a choice of broadband transport providers,[11] those other providers might impose their own undesirable limitations on consumer choice, perhaps, for example, to insulate their core video business from competition. And although the National Cable and Telecommunications Association has pledged that its members will not block VoIP services, if a cable company were to do so today the Commission might wish to prohibit such a practice pursuant to some of the same rules from which Verizon and BellSouth now seek forbearance.

Thus, the existence of competition between two or even more broadband transport providers does not provide a guarantee of non-discrimination. Instead, the evidence of competition provided by Verizon at most might support its designation as a non-dominant carrier in the broadband market. Evidence of competition has never been held to justify an exemption from non-dominant carrier regulation, such as nondiscrimination requirements, in other markets that were competitive long before the broadband market allegedly became so. For example, the interexchange market has been competitive for years, and even the smallest interexchange carriers have continued to be subject to the basic requirements of Title II. Competitive local

[11] Many customers do not have such a choice. *See* Vonage Comments, Docket 04-405, at 13-14.

telecommunications carriers such as Covad, meanwhile, are subject to the *Computer Inquiry* rules, and yet none are clamoring today for "relief" from the regulations applicable to non-dominant carriers. Indeed, contrary to Verizon's claims that these regulations thwart innovation, it has often been these smaller competitive carriers that have pioneered new services and technologies. Thus, the core principles of Title II and the *Computer Inquiry* rules do not become moot when a market becomes competitive.[12]

Next, Verizon contends that even if the duopolist LEC and cable company both decided to discriminate and reserve certain IP-enabled services markets to themselves, they "would not be able to discriminate against VoIP providers because they cannot pick out just those bits carrying voice data from the bit stream."[13] As a matter of fact, VoIP technology typically uses specific router ports that could be blocked by an underlying transport provider if it were so inclined. While there may be a number of countermeasures – the fact remains it is possible for an underlying broadband provider to impair a VoIP customer's ability to make calls – including 911 – without requiring constant monitoring or interference with the end user's bit stream. It is therefore clear that, contrary to Verizon's contentions, non-discrimination principles and the *Computer Inquiry* rules remain necessary to protect consumers and their ability to access third-party broadband applications.

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[12] Verizon's characterization of the *Computer Inquiry* rules as an "anachronism" of the AT&T monopoly era would rewrite history. Verizon Petition at 9. For example, the Commission in 2001 reaffirmed that "*all carriers* have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers." *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket 96-61; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket 98-183, Report and Order, FCC 01-98 (2001), at ¶ 46 (emphasis added).

[13] Verizon Reply Comments, Docket 04-405, at 21.

Chairman Powell has recognized this threat to the independence and growth of the IP-enabled services market, and thus concluded that "[p]reserving 'Net Freedom' ... will serve as an important 'insurance policy' against the potential rise of abusive market power by vertically-integrated broadband providers." Verizon's Petition, however, would have the Commission abandon its existing insurance policies (Title II and the *Computer Inquiry* rules) before it is ready to determine what policies are necessary for the future (i.e., some combination of at least portions of the existing Title II and the *Computer Inquiry* rules with new network neutrality rules). One cannot wait for an accident to go shopping for insurance. Verizon claims that carriers will behave in the absence of regulation, but if the Commission exempts broadband transport from Title II in isolation, there would be no legal standards in effect to measure what it means for them to behave. Carriers would arguably be free to use their newly-granted licenses to discriminate with impunity, virtually immune from enforcement actions or damages liability since there would be no effective rules they could violate. There is simply no sound basis for the Commission to leave broadband consumers and IP-enabled application and service providers defenseless in such a standard-less vacuum. Instead, the Commission should maintain at least the core of its existing insurance policies to safeguard competition and consumer choice pending completion of its reevaluation of broadband regulation.

III. VERIZON FAILS TO JUSTIFY THE BREADTH OF ITS REQUESTED RELIEF.

In any event, Verizon's request to exempt itself from sections 201 and 202 and the *Computer Inquiry* rules cannot be granted here because Verizon has, like BellSouth, failed to identify any unnecessary harms that cannot be remedied by lesser deregulatory relief. Instead, Verizon's request for relief from all Title II and *Computer Inquiry* rules is disproportionately broad compared to the specific injuries it alleges. When Verizon Petition finally decides to try to

explain (very briefly) why certain specific regulations are ripe for forbearance, on pages 14-15 of its Petition, it only complains of obligations that are part of dominant carrier regulation (mandatory tariffing and cost justification). Even if the Commission determined that it should relieve Verizon of these specific alleged harms immediately, it would only need to classify Verizon as non-dominant. Vonage takes no position on whether such classification would be appropriate, but does not object to the Commission's consideration of such relief at this time.

Verizon later in its Petition also complains of the costs of providing nondiscriminatory access to independent information services providers.[14] But Verizon shies away from contending openly that grant of a license to deny their customers access to competitive VoIP "is consistent with the public interest" – a finding that the Commission would be required to make to grant forbearance here. The Commission has made clear that the public interest would be served by the promotion of a competitive and innovative IP-enabled services market,[15] and it cannot now reasonably conclude that permitting Verizon to deny access to independent IP-enabled services would serve the public interest. Nor could the Commission reasonably determine that it would serve the public interest to relieve LECs of their legal obligations to provide nondiscriminatory access to 911 systems to VoIP providers.

Recognizing these hurdles to its petition, Verizon instead attempts to justify its request for sweeping relief of the core nondiscrimination requirements upon a plea for parity with the cable broadband providers. But as demonstrated above, before any rush is made to change the obligations of the LECs in the name of parity, it must be considered that the obligations of the cable broadband providers are currently under review in *Brand X* and could ultimately be

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[14] Verizon Petition at 22.

[15] *See, e.g., IP-Enabled Services, WC Docket 04-36, Notice of Proposed Rulemaking,* ¶ 5 (rel. Mar. 10, 2004).

changed substantially. Until the Commission has had the opportunity to consider its wireline and cable broadband proceedings *together* after the *Brand X* litigation is completed, it would be premature for the Commission to consider establishing *ad hoc* regulatory relief for ILECs based on concerns about parity of regulation with cable operators. At a minimum, it would clearly be prudent and appropriate for the Commission should preserve the bedrock principle of its current generation of rules – assuring non-discriminatory access to information services – until it has completed a comprehensive consideration of net neutrality and other safeguards that would be necessary to protect consumers if any of the existing safeguards are modified or eliminated. Only when the Commission has firmly settled upon its next-generation broadband regulatory framework should parity be used as a basis to justify changes to any carrier's obligations. Since parity is the only real basis that Verizon offers in support of its request for forbearance of regulations applicable to non-dominant carriers, at least that portion of its Petition must be deferred or denied.

IV. CONCLUSION

For the reasons stated in these comments, and in the attached opposition to BellSouth's similar petition, the Commission should deny Verizon's request for a license to discriminate against independent providers of IP-enabled applications and services.

Respectfully submitted,

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